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March 14, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: June 30, 2004

Case No.: TIA-0127

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be granted.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

¹ www.eh.doe.gov/advocacy.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a janitor at the Portsmouth Gaseous Diffusion Plant (the plant). He worked at the plant from 1974 to 1998.

The Applicant filed an application with the OWA, requesting a physician panel review of 3 illnesses - chronic obstructive pulmonary disease (COPD), emphysema, and bronchitis. The Applicant claimed that these conditions were due to exposures to toxic and hazardous materials at the plant.

The Physician Panel rendered a negative determination on all illnesses. The Panel identified a number of toxic substances but found that none of them are known to be associated with COPD. The Panel cited smoking as the most significant contributing factor to the Applicant's claimed illnesses. The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. Subsequently, the Applicant filed the instant appeal.

In his appeal, the Applicant argues that his smoking was not the cause of the claimed conditions but rather that his conditions were caused by exposures to lithium, Polychlorinated Biphenyls (PCBs), radioactive oils and contaminated materials. See Applicant Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

We have concluded that the Panel failed to provide an adequate explanation for its determination. The Panel did not address the issue of whether the Applicant's exposure to lithium was a factor in his COPD, emphysema, and bronchitis. The Applicant has indicated that he was frequently exposed to lithium. The record supports the Applicant's claim of lithium exposure; medical and occupational records from the plant indicate several instances where the Applicant was injured while working with lithium. See OWA Record, at 299-304. Accordingly, the Panel should have discussed the lithium exposures and explained whether these exposures could have been a significant factor in causing, contributing to, or aggravating the Applicant's lung disease.

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of this claim does not prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0127 be, and hereby is, granted.
- (2) The Physician Panel Report failed to explain adequately the basis of its determination. Further consideration is in order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 14, 2005